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April 22, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: June 23, 2004

Case No.: TIA-0118

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to her work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program.<sup>1</sup>

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.<sup>2</sup> Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.<sup>3</sup> Subpart E provides that all Subpart D claims will be considered as Subpart E claims.<sup>4</sup> OHA continues to process appeals until the DOL commences Subpart E administration.

### *B. Procedural Background*

The Applicant was employed as a lab technician at the DOE's Savannah River site (the site) for approximately thirty years.

The Applicant filed an application with the OWA, requesting physician panel review of her claims of neurodermatitis, digestive problems, rectal polyps, shortness of breath, sinus problems, and a benign breast mass. The Applicant asserted that her illnesses were the result of exposure to "radiation, toxins, chemicals and other occupational hazards" present at the site.<sup>5</sup>

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<sup>1</sup> See OWA website, available at <http://www.eh.doe.gov/advocacy/index.html>

<sup>2</sup> Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

<sup>3</sup> See *id.* § 3675(a).

<sup>4</sup> See *id.* § 3681(g).

<sup>5</sup> See Record at 11.

The Physician Panel rendered a negative determination for each of the claimed illnesses. The Panel found insufficient evidence that toxic exposures at DOE were a significant factor in aggravating, contributing to, or causing the illnesses. The Panel stated that one of the illnesses pre-dated her DOE employment and that the Applicant had risk factors for some of the other illnesses. The OWA accepted the Physician Panel's determinations, and the Applicant filed the instant appeal.

On appeal, the Applicant disagrees with a number of statements in the Panel report concerning her medical history and risk factors. She contends that none of her personal physicians have been able to identify the cause of her illnesses.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant has not identified Panel error. The record supports the Panel's references to the Applicant's prescription drug usage,<sup>6</sup> weight,<sup>7</sup> smoking history<sup>8</sup> and use of a wood burning stove.<sup>9</sup> The Applicant's argument that her personal physicians have not been able to identify the cause of her illnesses is consistent with the Panel's negative determination on the issue of whether "it is at least as likely as not" that the exposures were a significant factor in her illnesses.

As the foregoing indicates, the Applicant has not demonstrated Panel error. In compliance with Subpart E,

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<sup>6</sup> See Record at 281.

<sup>7</sup> See Panel Record at 34, 52, 106.

<sup>8</sup> See Panel Record at 28, 32, 35.

<sup>9</sup> See Panel Report at 34.

these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0118 be, and hereby is, denied.
- (2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: April 22, 2005